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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

COOL LIGHT COMPANY, INC.,

Petitioner,

v.

GTE PRODUCTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

We have passed this way before. The instant Certiorari Petition of Cool Light Company, Inc. ("Petitioner") is Petitioner's *tenth* attempt to reinstate a flawed jury verdict and its second Certiorari Petition to this Court.

GTE Products Corporation ("Respondent")[1] files this brief pursuant to Rule 15 of the Rules of the Supreme Court of the United States in opposition to the petition for a writ of certiorari of Petitioner. Though Respondent vigorously maintains that the First Circuit Court of Appeals' decision from which Petititioner seeks relief is correct, it will not here address the merits of that decision. Instead, Respondent asks this Court to deny the petition because (1) the status and procedural posture of this case are such that any resolution of the issues raised by Petitioner would not entitle it to any relief and would have no effect on the ultimate outcome of this action, and (2) Respondent is a stranger to the non-public judicial misconduct action initiated by Petitioner with former First Circuit Court of Appeals Chief Judge Breyer (now Justice Breyer), and should not be burdened with responding to Petitioner's complaints regarding that proceeding.

STATEMENT OF THE CASE

The parties initially tried this action to a judge (McNaught, J.) and a jury in the spring and early summer of 1990. Memorandum and Order, June 7, 1993 (Keeton,

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[1] On January 29, 1993, Respondent was purchased by Osram GmbH and changed its name to Osram Sylvania, Inc. Pursuant to Rule 29:1 of the Rules of this Court, Respondent states as follows: Osram Sylvania, Inc. is a Delaware corporation which is a wholly-owned subsidiary of Osram GmbH, which is a wholly-owned subsidiary of Siemens A.G. Osram Sylvania, Inc. does not have any non-wholly owned subsidiaries. Prior to January 29, 1993, GTE Products Corporation was a wholly-owned subsidiary of GTE Products of Connecticut Corporation, a Connecticut corporation. GTE Products of Connecticut Corporation is a wholly-owned subsidiary of GTE Corporation, a New York corporation. For simplicity sake, Osram Sylvania, Inc. will be referred to herein as "GTE Products Corporation" or "Respondent."

J.), A-21.* The jury returned a verdict in favor of Petitioner on three out of six counts and awarded it compensatory damages on each of the three counts and substantial punitive damages under California law. Jury Verdict Forms, A-92 through A-100. Respondent moved for judgment notwithstanding the verdict, and, in the alternative, for a new trial on the grounds, among others, that the verdict was against the clear weight of the evidence, that the damages awarded were excessive, and that the jury made multiple and inconsistent awards for the same claimed injury. Memorandum and Order, June 7, 1993 (Keeton, J.). A-23.

On August 9, 1990, Judge McNaught ordered a new trial on all counts tried to the jury, including those on which the verdicts went against the Petitioner. *Id.* at A-23.

Petitioner thereafter sought reconsideration from Judge McNaught of his new trial order, which was denied on August 29, 1990; a writ of mandamus from the Court of Appeals directing Judge McNaught to reinstate the jury verdicts, which was denied on October 22, 1990; and, after Judge McNaught's retirement and reassignment of the case to Judge Keeton, reconsideration of the new trial order from Judge Keeton, which was denied on July 25, 1991. *Id.* at A-24.

Next, Petitioner strategically chose to waive its right to a jury in the retrial, and to waive all but the three claims it had prevailed on before the jury. *Id.* At the close of the second trial, Judge Keeton ruled in favor of Respondent on all of Petitioner's claims, for several separate and independent reasons including Petitioner's:

***The citations herein are to the Appendix included in the Petition.**

failure to prove causation of harm, failure to prove breach of contract, failure to prove breach of implied duty of good faith and fair dealing, failure to prove fraud, and failure to prove damages. *Id.* at A-24 through A-25. Though having the opportunity to do so, Petitioner chose not to appeal Judge Keeton's findings, *id.* at A-25, and they are now the law of the case. Instead, Petitioner elected to appeal *only* Judge McNaught's decision to vacate the jury verdict and grant a new trial.

The Court of Appeals for the First Circuit affirmed Judge McNaught's new trial decision in an opinion dated August 21, 1992. *Id.* at A-25. Petitioner's subsequent petition for rehearing or rehearing en banc was denied by the Court of Appeals on October 15, 1992. *Id.* at A-25. Thereafter, this Court denied Petitioner's first petition for a writ of certiorari. *Cool Light Company, Inc. v. GTE Products Corp.*, 973 F.2d 31 (1st Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1417 (1993).

After the First Circuit affirmed Judge McNaught's decision granting a new trial, Petitioner initiated a campaign of contacting and soliciting affidavits from jurors who served during the first trial. Memorandum and Order, June 7, 1993 (Keeton, J.), A-29 through A-30 and A-46 through A-49. After the First Circuit denied Petitioner's petition for rehearing or rehearing en banc, on November 30, 1992, Petitioner filed a motion pursuant to Fed. R. Civ. P. 60(b)(6) accusing Judge McNaught of judicial misconduct and seeking to set aside his grant of a new trial and to reinstate the jury verdict in its favor. Plaintiff's Motion Seeking Relief from Orders and Judgment Pursuant to Fed. R. Civ. P. 60(b)-(6), A-59 through A-63. Judge Keeton found Petitioner's account of its contacts with jurors highly suspect and determined that Petitioner and its counsel had violated First Circuit law regarding post-verdict contact with

jurors and had violated Fed. R. Civ. P. 11 and scheduled a hearing to consider whether sanctions should be imposed. Memorandum and Order, June 7, 1993 (Keeton, J.), A-46 through A-50 and A-52 through A-53. Judge Keeton denied Petitioner's Rule 60(b)(6) Motion on the grounds, among others, that as Petitioner had already received a new trial before a new judge on terms of its choosing which resulted in a decision denying all its claims, from which it did not appeal, Petitioner was not entitled to further relief. *Id.* at A-35 through A-40. In an abundance of caution, Judge Keeton also undertook that which Petitioner sought and conducted a *de novo* review of Judge McNaught's decision granting a new trial. *Id.* at A-37 through A-38. Judge Keeton concluded that Judge McNaught's decision was warranted (indeed found that a judgment notwithstanding the verdict might have been more appropriate than a new trial order). *Id.* at A-38.

Respondent informed Judge Keeton that it wished to conclude this action, which had been pending since 1986, and that it therefore declined the Court's invitation to seek Rule 11 sanctions from Petitioner and its counsel. Memorandum, August 12, 1993 (Keeton, J.), A-55 through A-56. The District Court entered a final order denying Petitioner's Rule 60(b)(6) Motion on August 6, 1993. Final Order, August 6, 1993 (Keeton, J.), A-57.

Petitioner appealed Judge Keeton's decision denying its Rule 60(b)(6) Motion to the United States Court of Appeals for the First Circuit. *Cool Light Company, Inc. v. GTE Products Corp.*, 24 F.3d 349 (1st Cir. 1994) (Breyer, C.J.), A-1 through A-10. The First Circuit affirmed the denial of Petitioner's Rule 60(b)(6) Motion. *Id.* at A-10. The Court of Appeals assumed for argument sake that the allegations against Judge McNaught were

true and that Judge McNaught should have recused himself. *Id.* at A-6. Nonetheless, the Court of Appeals affirmed Judge Keeton's decision, holding:

> Had Judge McNaught recused himself, [Petitioner] would have had a new trial before a different judge. *Pontarelli v. Stone,* 978 F.2d 773, 775 (1st Cir. 1992). [Petitioner], however, did have a new trial before a different judge. And the law entitles it to no more.

Id. at A-7. The First Circuit further ruled that the unappealed decision of Judge Keeton from the second trial would prohibit Petitioner from recovering on any of its claims at a third trial, and that "any further trial on related matters would simply prove 'an empty exercise.' " *Id.* at A-8 and A-10. Finally, the Court of Appeals found that Judge Keeton had provided Petitioner with precisely what it requested: an independent *de novo* review of Judge McNaught's "new trial" decision, with appropriate deference for the jury verdict, and that Judge Keeton had reasonably found that the jury verdict from the first trial should have been set aside and that "a new trial should have been granted, if indeed the court did not instead order judgment for [Respondent] notwithstanding the verdict." *Id.* at A-9.

Petitioner next petitioned for rehearing or rehearing en banc, which was denied on June 16, 1994. Order of the Court, June 16, 1994, A-58. As a result of Exhibits attached by Petitioner to its Petition for Rehearing or Rehearing In Banc (sic), Respondent, for the first time, learned that Petitioner's counsel had brought judicial misconduct claims against both Judge McNaught and Judge Keeton. *Complaint v. McNaught, J. and Keeton, J. pursuant to 28 U.S.C. §372(c),* June 29, 1993, A-144 through A-151. This Complaint apparently lead to the

decision of then Chief Judge Breyer, from which Petitioner now complains. Order, August 25, 1993 (Breyer, C.J.), A-12 through A-17. Respondent has had absolutely no involvement in the Judicial Misconduct proceedings initiated by Petitioner, nor was it even aware of their existence until their recent revelation.

ARGUMENT

A. It Would Be Improvident To Grant Certiorari As Petitioner Is Not Entitled To Any Further or Different Relief Below Even If It Could Prevail On The Merits Of Its Argument To This Court.

While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Court of Appeals is judicial, not simply administrative or managerial.

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). The Court has recognized that when the resolution of a legal issue is irrelevant to the ultimate outcome of the case, as it is here, certiorari should be denied. *See, e.g., New York v. Uplinger,* 467 U.S. 246 (1984) (writ of certiorari dismissed as improvidently granted where federal question not clearly framed and challenged decision based on other decision from which review not sought); *Belcher v. Stengel,* 429 U.S. 118 (1976) (writ of certiorari dismissed as improvidently granted where full briefing and oral argument demonstrated additional grounds supporting lower court decision beyond basis challenged in petition for certiorari); *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO,* 361 U.S. 477, 491 n.16

(1960) (certiorari should be denied where litigation is not meaningful to the parties); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice, §4.4, pages 201-202 (6th Ed. 1986) (citing *Somerville v. United States,* 376 U.S. 909 (1964), as case where certiorari denied because resolution of the conflict would not change result reached below). *Cf. Muskrat v. United States,* 219 U.S. 346 (1911) (Court will not issue advisory opinions).

First, should Petitioner succeed on its argument that Judge McNaught should have recused himself, the only relief to which it then would be entitled would be a new trial before a different judge. Here, Petitioner already has received such relief. Second, remand for a third trial would be a fruitless exercise as Judge Keeton's findings from the second trial, from which Petitioner failed to appeal, are now the law of the case and effectively prohibit Petitioner from recovering on any of its claims. Third, Petitioner has already received the relief it now seeks: *de novo* review of Judge McNaught's new trial order. Fourth, reversing the New Trial Order would effectively deny Respondent its right to have a ruling on its Motion for Judgment Notwithstanding the Verdict or For a New Trial which it made at the close of the first trial. Finally, it would be a miscarrige of justice to reinstate the jury verdicts which the District Court and First Circuit found to be internally inconsistent, and concerning which this Court previously denied certiorari.

1. Petitioner Has Already Had the Only Relief to Which it Would be Entitled.

To be entitled to relief under Rule 60(b)(6), a litigant must demonstrate that vacating a contested judgment will not be an empty exercise. *Cotto v. U.S.,* 993 F.2d 274,

280 (1st Cir. 1993); *Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. Superline Trans. Co.*, 953 F.2d 17, 20 (1st Cir. 1992) (collecting cases); *see also* Fed. R. Civ. P. 61. Granting Petitioner relief would be futile because Petitioner has already had the only relief to which it would be entitled under its motion, that is, a "second trial before a highly competent and fair-minded [different] judge," *Cool Light Co. v. GTE Products Corp.*, 973 F.2d 31, 36 (1st Cir.), *cert. denied*, ___ U.S. ___ , 113 S.Ct. 1417 (1993), on terms of its own choosing. *See Pontarelli v. Stone*, 978 F.2d 773, 775 (1st Cir. 1992) ("If a trial judge has wrongly failed to disqualify him or herself, the remedy to correct this situation is for the appellate court to reverse the decision of the case on the merits and to order a new trial before a different judge."); *see also Comacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 490 (1st Cir. 1989) (appellate court having "independently confirmed the correctness of the lower court's decision," the trial "judge's refusal to recuse himself was, at worst, harmless error" thereby rendering moot the matter of disqualification). *Cf. Fashion House v. K-Mart*, 892 F.2d 1076, 1096 (1st Cir. 1989) (noting that remand of a case in the District of Rhode Island for retrial would result in reassignment to a new trial judge, thereby rendering moot an attack on the initial trial judge's fairness and demeanor). As Petitioner has already been granted the only relief to which it would be entitled were it able to prove its scandalous charges against Judge McNaught, its petition should be denied as moot. Petitioner is not entitled to yet a third trial.

2. Judge Keeton's Unappealed Findings In The Second Trial Are Now Law Of The Case, Foreclosing Any Further Relief To Petitioner.

Judge Keeton ruled in favor of Respondent as to all Petitioner's claims at the end of the second trial in this matter. Judgment, May 25, 1994 (Breyer, C.J.), A-7 through A-10. Judge Keeton found, among other things, that Respondent did not cause the harm Petitioner alleged, that Respondent had not breached its agreement with Petitioner, that Respondent did not commit fraud, and that Petitioner failed to prove damages with sufficient specificity. *Id.* at A-7. Judge Keeton's decision has not been appealed from and is now the law of the case. *See generally Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-816 (1988) (approving law of the case doctrine); *Lacy v. Gardino,* 791 F.2d 980, 984 (1st Cir.) (law of the case doctrine makes binding upon court a ruling by a court of the same or higher level made during prior stages of the same litigation), *cert. denied,* 479 U.S. 888 (1986); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.,* 810 F.2d 243, 250 (D.C. Cir. 1987) (law of the case doctrine requires that legal decision made at one stage of litigation which is unchallenged in subsequent appeal when opportunity to do so existed becomes law of the case for future stages of same litigation and parties are deemed to have waived right to challenge that decision at later time); *Laffey v. Northwest Airlines, Inc.,* 740 F.2d 1071, 1089-1090 and 1102-1103 (D.C. Cir. 1984) (unappealed lower court decisions are law of the case in proceedings after remand), *cert. denied,* 469 U.S. 1181 (1985); *Munoz v. Imperial County,* 667 F.2d 811, 817 (9th Cir.) (same), *cert. denied,* 459 U.S. 825 (1982); *Fogel v. Chestnutt,* 668 F.2d 100, 109 (2d Cir. 1981) ("It would be absurd that

a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."), *cert. denied,* 459 U.S. 828 (1982); J. Moore, J. Lucas & T. Currier, 1B Moore's Federal Practice, §0.404[1] and 4.-3] (1992). In short, Judge Keeton's decision that Petitioner has no case, unappealed by Petitioner and respected by the Court of Appeals, would be binding were this case remanded.

3. To Reinstate the Jury Verdicts Would Effectively Deny Respondent Its Right to Have a Ruling on Its Motion for JNOV or a New Trial.

After the jury in the first trial rendered its verdicts, Respondent moved, as was its right under the Federal Rules of Civil Procedure, for a judgment notwithstanding the verdict and, in the alternative, for a new trial. Memorandum and Order, June 7, 1993 (Keeton, J.), A-22 through A-23. Among other things, Respondent argued that the verdicts were against the clear weight of the evidence. *Id.* at A-23. To reinstate the jury verdicts would effectively deny Respondent its right to have its motion for JNOV or a new trial decided by a judge who saw the witnesses testify, observed their demeanor and was in a position to judge their credibility. *See Marshall v. Lonberger,* 459 U.S. 422, 434 (1983) (reviewing court is not in a position "to redetermine credibility of witnesses whose demeanor has been observed by the . . . trial court."), *United States v. Oregon Medical Society,* 343 U.S. 326, 339 (1952) ("Face to face with living witnesses [the trial judge] holds a position of advantage from which appellate judges are excluded. . . . [T]he exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . .

How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.") (citation omitted); *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992) (emphasizing "deference that is due the trial court's first-hand experience of the witnesses, their demeanor and the over-all context of the trial").

Clearly, Respondent is entitled to have a ruling on its motion for a new trial at some point. Fed. R. Civ. P. 50 and Fed. R. Civ. P. 59. The only one who could make such a determination is the judge who presided over the trial and who was thereby able to observe the demeanor and testimony of live witnesses: Judge McNaught. As Judge McNaught has retired from the bench and is now deceased, the only practical way of protecting Respondent's right to move for a new trial would be to conduct a second trial to determine whether Petitioner's claims are valid. In this case, the second trial has already occurred and Judge Keeton has ruled that, for numerous separate and independent reasons, Petitioner cannot prevail on its claims.

4. Petitioner Has Already Received The Relief It Now Expressly Seeks: De Novo Review By a Judge Other Than Judge McNaught.

Judge Keeton conducted a *de novo* review of Judge McNaught's decision to order a new trial.

> [W]hen addressing the matter "*de novo*" (that is, independently and nondeferentially), I reach the conclusion that a new trial should have been granted. The primary grounds for this conclusion are the ambiguities and arguable inconsistency of findings

> of the jury and the insufficiency of the evidence to support the damages findings on any basis short of speculation.
>
> . . . .
>
> [I]f a court, considering the matter *de novo* in light of the full record in this case, did not order judgment for the [Respondent] on all counts tried to the jury, notwithstanding the verdict of the jury on some counts, it should at least set that verdict aside because the verdict was contrary to the overwhelming weight of the evidence on causation issues central to every claim asserted by the [Petitioner] and found for the [Petitioner] by the jury. Thus, it was entirely appropriate that a new trial be granted.

Memorandum and Order, June 7, 1993 (Keeton, J.), A-37 through A-38; Judgment, May 25, 1994 (Breyer, C.J.), A-9 ("Moreover, despite [Petitioner's] strong contrary protestations, our review of the record indicates that Judge Keeton gave Judge McNaught's 'new trial' decision that very new and independent review, with appropriate deference for the jury verdict, for which [Petitioner] argues.").

5. The Court Should Not Reinstate Demonstrably Erroneous Jury Verdicts.

Finally, it would be fundamentally unjust to reinstate jury verdicts which two federal judges have independently found to be demonstrably wrong. *Id.* at A-4.

B. It Would Be Unfair To Burden Respondent With The Task Of Briefing And Arguing The 28 U.S.C. §372(c) Issues Raised By Petitioner.

Respondent is a stranger to Petitioner's counsel's judicial misconduct complaint against Judge Keeton and the late Judge McNaught. Respondent was unaware until recently that such a complaint even had been filed and had absolutely no involvement with its consideration by the Circuit Counsel for the First Circuit. As detailed in the preceding section, Petitioner is not entitled to any additional relief on its claims against Respondent. The Court should not visit upon Respondent the task of defending against claimed deficiencies in a confidential proceeding in which it was not involved, nor should it impose on the Respondent the hardship and expense of remaining in this case any longer.

CONCLUSION

It would be improvident to grant a writ of certiorari in a case, such as this, in which no further relief can be granted to the Petitioner because it already has received all the relief available. The petition should be denied.

Respectfully submitted,

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